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OFFICE SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 738

THE SEVEN-UP COMPANY,

Petitioner,

vs.

BLUE NOTE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING CO., CHICAGO

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STATEMENT.

Respondent operates a place of entertainment for devotees of jazz music, and incidentally serves beverages to patrons. It does not carry petitioner's "7-Up", but does carry a beverage known as "Upper Ten", the total sales of which amount to less than $500 in an entire year (R. 50). Employees are carefully instructed to tell patrons who may order 7-Up that respondent does not serve it but does have Upper Ten (R. 44-46). The few alleged instances of so-called "passing off" of Upper Ten for 7-Up were entirely due to the occasional failure of employees to heed

instructions, and in the aggregate obviously involved an insignificant dollar amount (petitioner omitting any proof of the dollar amount involved). Accordingly petitioner's assertions that respondent is "passing off a spurious beverage" and is engaged in "deceptive exploitation" are hardly appropriate to describe the actual facts; rather they are calculated to color a *de minimis* situation with an air of importance.

QUESTIONS PRESENTED.

(1) In a suit for injunction, where the complaint alleges damage but makes no claim that defendant's conduct threatens destruction of plaintiff's good will, and no attempt whatsoever is made to prove the character or amount of supposed damage, present or prospective, is the value of the matter in controversy to be measured by the entire value of the good will?

(2) Where there is no allegation in the complaint that the case arises under the Lanham Act; no allegation that defendant's acts affect commerce; no attempt to prove any effect upon commerce; and the facts make it plain that commerce is not affected—does the District Court have jurisdiction of the cause under the Lanham Act?

REASONS FOR NOT GRANTING THE WRIT.

1.

The question as to the value of the matter in controversy was settled by this Court many years ago. *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 181, 80 L. Ed. 1135 (1936); *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278-9, 81 L. Ed. 183 (1936).

The value of the good will could be the amount in controversy only if the entire value of the good will were in jeopardy. The complaint (R. 3-6) makes no such claim, and no proof of such a nature was offered or attempted; from the facts it is evident that such a claim would be absurd. Indeed, no proof whatsoever was made of the character or amount of damage to the petitioner's good will, or, indeed, that there was any damage at all.

As is pointed out in the concurring opinion below of Judge Hastings (petition, pp. 13a-14a) the statements in the various authorities to the effect that the value of the good will is the amount in controversy signify only that the damages are not to be limited to those accrued, but should include those reasonably to be expected to occur in the future. Since, in the case at bar, there was no attempt whatsoever to prove the amount of damage involved, either accrued or prospective, the record is devoid of any basis for the proposition that jurisdictional amount is to be measured by the entire value of the good will.

Such being the status of the pleadings and proof, the court below rightly applied this Court's holdings in the *McNutt* case, 298 U. S. 178, 181, and in the *KVOS* case, 299 U. S. 269, 278-9.

The asserted "conflict" between the circuits does not exist; the supposed conflicting holdings are predicated upon a variety of different factual situations, different pleadings and different proof. There is no federal jurisdictional question involved which has not long since been settled by this Court.

2.

The only ground of jurisdiction alleged in the complaint is that of diversity of citizenship (R. 3-6). Not only does the complaint fail to assert jurisdiction under the Lanham Act but it is devoid of any allegation that respondent is engaged in commerce or that its acts affect commerce. Nor was any evidence offered on this subject. It is evident from the record that respondent's total soft drink sales are insignificant in amount and are wholly intrastate, being confined to the premises of a single night club in Chicago.

Petitioner cannot assert jurisdiction under the Lanham Act when it has (1) failed to plead such jurisdiction, and (2) offered no evidence that commerce is involved or affected. Cyclopedia of Federal Procedure, Third Ed., Volume 4, § 14.148; *Gully* v. *First National Bank*, 299 U. S. 109, 113, 81 L. Ed. 70; *Stauffer* v. *Exley*, 194 F. (2d) 962, 967 (1950).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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